IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No. 272 of 2005

Atulya Mishra
S/o Shri Trilochan Mishra
R/o Gali No. 4 Khannanagar near Mazar
P.S. Jwalapur, District Haridwar ……..Applicant

Versus

1. State of Uttaranchal
2. IInd F.T.C./Additional District Judge Haridwar
3. Anil Kumar Sharma
   S/o Anand Swaroop Sharma
   (owner Himalaya Depot)
   under Construction house No. 905
   Gali No. 4 Khannanagar
   P.S. Jwalapur, District Hardwar.…Respondents.

Hon'ble Prafulla C. Pant, J

Heard Shri Parikshit Saini, learned counsel for the applicant and Shri G.S. Sandhu, learned A.G.A. for the State.

2. By means of this petition, moved under Section 482 of Code of Criminal Procedure, 1973 (for brevity herein after referred as Cr.P.C.) the petitioner has challenged the order dated 05.01.2005, passed in criminal revision No. 297 of 2004 by IInd Fast Track Court/Additional Sessions Judge, Haridwar, whereby order summoning the respondent No. 3 in criminal complaint case No. 730 of 2004, is set aside and complaint is directed to be dismissed under Section 203 Cr.P.C.

3. It was alleged in the complaint that respondent No. 3, got constructed his house by taking assistance of complainant (a contractor). An amount of Rs. 5,75,000/- is said to have been paid through drafts by respondent No. 3. The case of respondent No. 3 was that he had made full payment to the contractor. The petitioner who is contractor has alleged that payment made to him is incomplete and he has been cheated of Rs. 2,80,000/-.

4. The Magistrate, after recording the evidence under Sections 200 and 202 Cr.P.C. passed an order on 31.08.2004, summoning the accused (respondent No. 3). Aggrieved by said order, the respondent No. 3 appears to have preferred criminal revision No. 297 of 2004, before the learned Sessions Judge, Haridwar. After hearing the parties, the Additional Sessions Judge, to whom the revision was transferred, allowed the revision and set aside the order, summoning the accused (respondent No. 3). The petitioner (complainant) has challenged the said order passed by Additional Sessions Judge, in these proceedings.

5. Shri Parikshit Saini, learned counsel for the petitioner (complainant) argued that the impugned order passed by learned Additional Sessions Judge is without jurisdiction. In this connection, he relied on principle of law laid down in Adalat Prasad Vs. Roop Lal Zindal 2004 AIR SCW 5174. I agree with the argument of learned counsel for the petitioner that in Adalat

Prasad's case (Supra) the Apex Court has held that after an order is passed under Section 204 of Cr.P.C., by the Magistrate, the only remedy available to the accused is to file petition under Section 482 Cr.P.C. provided the order is wrong. That being so, the revision was not maintainable before learned Sessions Judge. As such, the impugned order, passed by learned Additional Sessions Judge is without jurisdiction.

6. However, in exercise of its powers under Section 482 Cr.P.C. it is the duty of this Court that a wrong order does not get revived only on the technical ground. After going through the copy of the complaint and the impugned order, this Court is of the view that prima facie the dispute is of a civil nature between the parties, regarding payment of work done by the contractor in building house of respondent No. 3. Therefore, the petition under Section 482 Cr.P.C. in these circumstances, is allowed and impugned judgment and order dated 05.01.2005, is set aside as the same appears to have been passed without jurisdiction. But at the same time, it is directed that the order passed by the Magistrate, is also set aside and the matter is remanded to the Magistrate to re-examine the evidence recorded under Sections 200 and 202 Cr.P.C. in the light of the observations made above and to pass appropriate orders under section 203 or 204 of Cr.P.C.

Dt. 25.09.2006 **(Prafulla C. Pant, J.)**
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